IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 150 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VASANTKUMAR A SHAH

Versus

STATE OF GUJARAT

Appearance:

MR YV BRAHMBHATT for Petitioner

MR SJ DAVE, APP for Respondent No. 1

RULE SERVED for Respondent No. 2

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 04/08/2000

ORAL JUDGEMENT

Present petitioner-orignal accused of Criminal Case No.1 of 1993 has preferred the present Special Criminal Application against the judgment and order passed by the learned Sessions Judge, Mehsana in Criminal Revision Application No.142 of 1993 whereby he has

dismissed the said application filed by the present petitioner against the common order passed by the learned Judicial Magistrate (First Class), Kalol upon Exs.8, 11 and 20 of Criminal Case No.1 of 1993. The learned Judicial Magistrate (First Class) allowed the application Ex.20 filed by the complainant for condonation of delay by condoning the delay, but he has rejected the application Ex.8 filed by the present accused for discharging him from the above criminal case. He has also rejected the application Ex.11 filed by the complainant praying that if Court comes to the conclusion that delay caused in filing the complaint cannot be condoned, then complaint may be treated to be under Sec.420 of Indian Penal Code.

2. I have heard Mr.Y.U.Brahmbhatt, learned advocate for the petitioner and Mr.S.J.Dave, learned APP for the respondent No.1-State. The respondent No.2-original complaint was duly served. He has chosen not to appear either personally or through advocate in the Court.

3. It appears that no revision or any other proceedings was initiated by the complainant against the order passed by the learned Judicial Magistrate (First Class) rejecting the application Ex.11 filed by him, and, therefore, said order remained unchallenged. Criminal Revision Application No.142 of 1993 was filed by the present petitioner before the Sessions Court challenging the order passed by the Court below upon Exs.8 and 20.

4. It is not in dispute that complaint has been filed by the complainant on 1-1-1993 wherein notice was issued to the petitioner-accused on 13-11-1992 which was received by the petitioner-accused on 16-11-1992. So, admittedly there is a delay of only one day in filing the complaint in question which fact is also confirmed in the judgment and order passed by the Sessions Court in Criminal Revision Application No.142 of 1993 more particularly in para 6 of the said judgment. Unfortunately, both the Courts below came to the wrong conclusion that the delay caused in filing the complaint under the provisions of Sec.138 of the Negotiable Instruments Act, (hereinafter referred to as `the Act') can be condoned. But to arrive at a correct conclusion, what is required to be seen is Secs.138 and 142 of the Act. Sec.138 reads as under:

"138. Dishonour of cheque for insufficiency, etc. of funds in the account:- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money

to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

Sec.142 reads as under:

"142. Cognizance of offences:- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint in writing, made by the payee or, as the case may be, the

holder in due course of the cheque;

b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138;

c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138."

Combined reading of these sections makes it apparent that the drawer of the cheque is entitled to file the complaint within 45 days of service of notice. In the instant case, admittedly, as per the findings of both the Courts below, the impugned complaint under Sec.138 of the Act has not been filed within 45 days of service of notice and, therefore, it is clearly beyond the period prescribed under Sec.142 (b) of the Act. As per Sec.142(b), the Court is barred from taking cognizance once the prescribed period expired and the period prescribed under Sec.142(b) of the Act is not a period of limitation but a condition precedent and, therefore, the period cannot be extended by any means if the condition is not fulfilled and delay cannot be condoned under any provisions of law.

5. In view of the aforesaid discussion, I am of the opinion that the findings of the Courts below are not legal, just and proper and it requires interference. Therefore, order passed by the Court below upon Ex.20 is hereby set aside. Same way, judgment and order dated 14-10-1993 passed by the learned Sessions Judge, Mehsana in Criminal Revision Application No.142 of 1993 is also set aside. Having regard to the above facts and circumstances of the case, application submitted by the present petitioner-accused before the Court below upon Ex.8 is allowed. The impugned complaint which has been filed under Sec.138 of the Negotiable Instruments Act against the petitioner-accused being Criminal Case No.1 of 1993 pending before the learned Judicial Magistrate (First Class), Kalol, is hereby quashed. Rule is made absolute accordingly with no order as to costs.

(R.P.DHOLAKIA,J.)
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